No. 80-1268

IN THE

Supreme Court of the United States

October Term, 1980

MONONGAHELA POWER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION,
Respondents,

and

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Intervening Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF INTERVENING RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a shipper which voluntarily avails itself of a settlement procedure approved and authorized by the Interstate Commerce Commission, to obtain relief from certain demurrage charges accrued in extraordinary circumstances, may obtain a subsequent determination of the reasonableness of those same charges in derogation of the voluntary settlement.

DISCLOSURE STATEMENT REQUIRED BY RULE 28.1

The Baltimore and Ohio Railroad Company is a subsidiary of The Chesapeake and Ohio Railway Company, which owns 99.9% of its capital stock. The Chesapeake and Ohio Railway Company is a wholly-owned subsidiary of CSX Corporation. Other corporations (other than wholly-owned corporations) which are subsidiaries or affiliates of B&O are shown below:

The Akron and Barberton Belt RR Co.
The Akron Union Passenger Depot Co.
Allegheny and Western Ry. Co.
Atlanta and West Point RR
Augusta & Summerville RR Co.
The Baltimore and Cumberland Valley RR Extension Co.
The Baltimore and Philadelphia RR Co.
Beaver Street Tower Co.
Belt Railway Co. of Chicago
Buffalo, Rochester and Pittsburgh Rwy. Co.
Central Florida Pipeline Corp.
Central RR Co. of South Carolina
Central Transfer Rwy. & Stge. Co.
Chatham Terminal Co.
Chicago South Shore and South Bend RR
Chicago & Western Indiana RR Co.
Cincinnati Inter-Terminal RR Co.
Cincinnati Union Terminal Co.
Clearfield and Mahoning Rwy. Co.
The Cleveland Terminal & Valley RR Co.
Clinchfield RR Co.
Columbia, Newberry & Laurens RR Co.
Dayton and Michigan RR Co.
The Dayton Union Rwy. Co.
Durham and Southern Rwy. Co.
Duval Connecting RR Co.
Eastern Hardwoods, Incorporated
First Georgia Development Co.
Fruit Growers Express Co.
Georgia RR
Green Real Estate Co.

Haysi RR Co.
High Point, Thomasville & Denton RR Co.
Holston Land Co., Inc.
The Home Avenue RR Co.
Illinois Terminal RR Co.
James Center Development Co.
Kentucky & Indiana Terminal RR Co.
The Lakefront Dock and RR Terminal Co.
Littleton Fuel Company
Louisville, Henderson & St. Louis Ry. Co.
Mid Allegheny Corporation
Monon Coal Co.
The Monongahela Rwy. Co.
Nashville & Decatur RR
New Gauley Coal Corporation
Nicholas, Fayette and Greenbriar RR Co.
Norfolk and Portsmouth Belt Line RR Co.
Paducah & Illinois RR Co.
Park-N-Shop, Inc.
The Pullman Co.
Richmond, Fredericksburg and Potomac RR Co.
Richmond-Washington Co.
Savannah River Terminal Co.
South Carolina Pacific Rwy. Co.
Terminal RR Assoc. of St. Louis
The Toledo Terminal RR Co.
Trailer Train Co.
The Tylerdale Connecting RR Co.
Washington County RR Co.
The Washington Terminal Co.
Wesjax Development Co.
Western Maryland Company
Western Maryland Ry. Co.
The Winchester and Potomac RR Co.
Winston Land Corp.
Winston-Salem Southbound Rwy. Co.
Woodstock & Blocton Ry. Co.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The winter of 1976-1977 was the most severe in the eastern part of the United States in many years. Because of the adverse weather conditions, many rail shippers and consignees were unable to load or unload rail cars promptly. Particular problems were experienced by shippers and consignees of coal, which became frozen in the rail cars and was rendered difficult or impossible to unload promptly.

As a result of these conditions, many shippers and consignees were subject to substantial demurrage charges, which accrued according to the carriers' tariffs filed with the Interstate Commerce Commission (ICC) on cars held by shippers and consignees for loading or unloading. Negotiations with the railroads were begun by the National Industrial Traffic League (NITL),[1] to prevent the imposition of a portion of the applicable demurrage charges which accrued as a result of these unusual weather conditions.

These negotiations resulted in the filing of a petition with the ICC by a number of railroads, including The Baltimore and Ohio Railroad Company (B&O)[2], intervening respondent herein, seeking approval of a proposal whereby they would be authorized to waive a portion of the demurrage charges which accrued as a result of the unprecedented weather conditions, if the shipper claiming relief and the affected railroad agree upon the facts and the justification for such relief.

The NITL and certain individual shippers supported the railroad proposal before the ICC and suggested modifications. By Order dated August 3, 1977, in No. 36574, *Petition of Railroads Seeking Authorization to Waive Demurrage Charges Caused by Severe Winter Weather*, the ICC approved the railroads' proposal, with certain modifications.[3]

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[1] The National Industrial Traffic League is a voluntary association of shippers and shipper organizations, which for more than 70 years has had an impact in matters before the ICC having a substantial interest on its members and the shipping public at large.

[2] B&O is a subsidiary of The Chesapeake and Ohio Railway Company, and together with that Railway and the Western Maryland Railway, constitutes the Chessie System.

[3] For text of this Order, see Appendix B to the Petition for a Writ of Certiorari filed in this cause.

The relief authorized in this Order was strictly voluntary on the part of shippers or consignees. This is made clear by the following passage from the text of the ICC's Order, including footnote 4 appended thereto:

> The extension of the proposal to demurrage charges not named in the involved tariff or in an amount greater than that specified has not been substantiated. However, the approval of the instant proposal does not prejudice the filing of such proposals by the carrier or the filing of additional claims for greater relief by the shippers.[3] Furthermore, shippers or receivers will have the option of applying for the claim under the involved proposal, filing a claim under the proposal and in the event no binding settlement is made subsequently seeking relief from alleged unjust and unreasonable demurrage charges under the Commission's regular procedures, or by initially seeking relief from the Commission under its regular procedures.[4]

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[3] The waiver or reparation of the penalty portion of demurrage charges has been approved when neither the carrier nor shipper is at fault. *Ford Motor Co. v. Chesapeake and O. R. Co.*, 311 ICC 559 (1960); *Kalmbach-Burkett Co., Inc. v. Illinois Central R.* Co., 289 ICC 532 (1953); and *Myers, Myers & Goen v. Chicago, R. I. & P. Ry. Co.*, 259 ICC 51 (1944). The shipper, however, is required to make efforts if possible, to minimize the detention of the cars. Waiver of all of the applicable demurrage charges (including the compensatory portion), is generally not approved.

[4] Shippers and receivers are encouraged to file claims initially with the carrier. The procedures adopted and standards applied for settlement under the claim procedures will be strictly voluntary and will not bind individual shippers who either do not qualify for settlement thereunder or do not invoke the claim procedures under the proposal.

In addition, the proposal approved by the ICC contained the following note:

> NOTE: Shippers and receivers can elect to file a claim under this proposal or a formal docket with the Interstate Commerce Commission. The filing of a claim under this proposal also does not prevent the shipper from seeking additional relief from the Commission. In addition, special-docket applications can be filed by the carrier.

Monongahela Power Co. (Monongahela), Petitioner herein, had accrued demurrage charges in the amount of $1,104,010 during the period of severe weather conditions covered by the Order in No. 36574. It filed its claim with B&O pursuant to that Order, seeking a refund in the amount of $521,500, the maximum amount authorized by the Order. This refund was allowed in full by B&O.

By a subsequent complaint filed with the ICC on April 13, 1978, Monongahela sought recovery of the balance of the applicable demurrage charges in the amount of $582,510, or, in the alternative, the "penalty" portion of the charges, alleging that because of the severe winter weather conditions release of the cars was impossible due to conditions beyond its control. This complaint was docketed by the ICC as No. 36918, *Monongahela Power Co. v. Baltimore and Ohio Railroad Co.*

By Order dated April 27, 1978, this complaint was set for hearing pursuant to the ICC's Modified Procedure,[4] providing for submission of the case on written statements of facts and argument. Pursuant to this procedure, Monongahela and B&O filed their evidence and arguments in written form, and Monongahela filed a reply statement.

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[4] See 49 C.F.R. § 1100.43 – 1100.52.

By Order dated October 27, 1978, Review Board No. 4 of the Commission[5] issued its decision on Monongahela's complaint.[6] In this decision, the Review Board discussed the evidence filed by the parties concerning the handling of rail cars during the adverse weather conditions, and the claim filed by Monongahela pursuant to No. 36574 and allowed by B&O. The Review Board noted that the claim filed and allowed was for the full amount authorized pursuant to the approved procedures. It held that as Monongahela had voluntarily sought relief pursuant to No. 36574, and had received a refund in the maximum amount authorized, it had entered into a binding settlement and was barred from receiving further relief.

Monongahela filed an administrative appeal to this decision, and on August 21, 1979, Division 2 of the Commission[7] adopted the Order of Review Board No. 4 and dismissed the complaint.[8]

Whereupon, Monongahela filed its Petition for Review, which was designated No. 79-1662, *Monongahela Power Co. v. United States and Interstate Commerce Commission,* before the United States Court of Appeals for the Fourth Circuit. This matter was briefed and argued

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[5] Review Board No. 4 is an employee board of the ICC established pursuant to 49 U.S.C. § 10304. This matter was delegated to this board for initial decision pursuant to 49 U.S.C. § 10305 and 49 C.F.R. § 1011.6(g). Review Board No. 4 is the employee board of the ICC which regularly reviews rates and practices matters.

[6] For copy of this decision, see Appendix C to the Petition for a Writ of Certiorari filed herein.

[7] Consisting of 3 Commissioners. See 49 U.S.C. § 10302 and 49 C.F.R. § 1011.3.

[8] See Appendix D to the Petition for a Writ of Certiorari for a copy of the decision of Division 2.

by the parties, and by decision dated October 30, 1980, the Court of Appeals reviewed the decisions of the ICC and concluded that they were lawful within the standards of 5 U.S.C. § 760(2)(A), and affirmed the ICC.

SUMMARY OF ARGUMENT

Monongahela voluntarily agreed to a settlement of alleged unreasonable demurrage charges pursuant to procedures approved by the ICC. It has not been denied a full hearing just because, in a subsequent complaint to the ICC challenging the lawfulness of the same demurrage charges, the ICC held that it was bound by its prior settlement.

No special reason for grant of the Writ has been shown. Remand of the proceeding for reconsideration by the ICC would not change the result, as the ICC would be bound by the decision in another case involving the same parties, *Monongahela Power Co. v. United States and Interstate Commerce Commission,*[9] to deny further relief from applicable demurrage charges.

ARGUMENT

I. Monongahela Received A Full Hearing Before the ICC

The basis for the Petition for a Writ of Certiorari is the allegation that Monongahela has been denied the full hearing to which it is entitled upon the issue of the reasonableness of the demurrage charges which it has been required to pay. The theory of its case is that the ICC

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[9] No. 80-1365, 4th Cir., February 13, 1981. See Appendix A attached hereto for text of this decision.

blindly approved a settlement made pursuant to a proposal offered by the railroads, and refused to give Monongahela the full hearing on the reasonableness of its charges required by statute.

The extended statement of the case which precedes this argument belies Monongahela's position. Monongahela's actual fault with the proceedings below is not that it was denied a full hearing and decision on the reasonableness of the involved demurrage charges, but that the decision was made on evidence different from that advocated by Monongahela, and reached a conclusion different from that sought by it. This is a matter of the exercise of discretion, not a refusal to hear, and does not constitute a basis for reversal. *ICC v. United States ex rel. Humboldt Steamship Co.*, 224 U.S. 474 (1912).

A. There Was No Error In the Decision of the ICC.

The Petition for a Writ of Certiorari obscures a critical fact: Monongahela *voluntarily* sought and received a refund pursuant to the special procedures of No. 36574. Nothing in the decision adopting those procedures or the actions of the parties *required* Monongahela to avail itself of the relief offered. On the contrary, the ICC was careful to state that the procedures adopted were voluntary with the shippers. Its decision stated that shippers would have the option of filing a claim pursuant to the adopted procedures, filing a claim and seeking subsequent relief if no binding settlement is made, or initially seeking relief from the Commission pursuant to regular complaint procedures. Its footnote 4 pointed out that the procedures and standards adopted "will be strictly voluntary and will not bind individual shippers who . . . do not invoke the claim procedures under the proposal." A note attached to the procedures states that shippers may elect to file a

claim under the proposal or a complaint on the formal docket. The note points out that the filing of a claim does not prevent a shipper from seeking further relief,[10] and that special docket applications may be filed by carriers.

Monongahela alleges that it elected the second option, but the ICC held that the acceptance of relief in the maximum amount authorized constituted a binding settlement. This finding, upheld by the Court of Appeals, constitutes a valid and reasonable interpretation of the ICC's own order in No. 36574. This interpretation is entitled to great weight. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945); *United States v. Lieb*, 462 F. 2d 1161 (Em. App. 1972).

B. The ICC Considered All Relevant Evidence.

Monongahela alleges that the ICC denied it a full hearing because it did not make findings on the evidence submitted as to the reasonableness of the involved charges. However, the ICC is not required to make findings on issues which are unnecessary for the result reached. *Immigration & Naturalization Service v. Bagamasbad*, 429 U.S. 24, 25-26 (1976). The agency must only make findings necessary to support its order. *Raye & Company Transports v. United States*, 314 F. Supp. 1036, 1043 (W. D. Mo., 1970); *Community & Johnson Corp. v. United States*, 156 F. Supp. 440, 443 (D. N.J. 1957).

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[10] Monogahela has placed great emphasis below on this provision. However, it overlooks the fact that the reference is to the *filing* of a claim. The note was no doubt to encourage the filing of claims by shippers who might hesitate to file through fear that their claims would be denied, and that they would therefore be barred from obtaining *any* relief from excessive demurrage charges. The note does not contradict the text of the ICC's order, which allows subsequent relief only in the event no binding settlement is made.

To say, as Monongahela apparently does, that the ICC was required to make findings upon the evidence of weather conditions and its efforts to unload and release cars under adverse conditions, and to decide this case upon such findings, is to say that the ICC could give no consideration whatever to Monongahela's voluntary settlement pursuant to No. 36574.

II. The Statute Does Not Require An Investigation Based on the Evidence Offered By Monongahela

Monongahela alleges that 49 U.S.C. § 11701(b) *requires* the ICC to conduct an investigation into the reasonableness of the involved demurrage charges. A careful reading of the statute shows that this just is not so. In fact, Congress has vested the ICC with considerable discretion in the disposition of complaints filed with it. Thus, the statute gives the ICC discretion to "dismiss a complaint it determines does not state reasonable grounds for investigation and action."[11]

III. The Cases Cited By Monongahela Are Inapposite

Monongahela cites *ICC v. Baird*, 194 U.S. 25 (1904), *ICC v. United States ex rel. Humboldt Steamship Co.*, 224 U.S. 474 (1912), and *United States ex rel. Kansas City Southern Ry. v. ICC*, 252 U.S. 178 (1920) for the proposition that the ICC must investigate a matter within its jurisdiction. But *ICC v. Baird* merely dealt with the provision of the statute forbidding dismissal of a complaint on the grounds that the complainant shows no direct damage as

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[11] Nevertheless, it is the position of B&O that the ICC did in fact conduct a full hearing on Monongahela's complaint, as explained in Part I of this argument.

a result of the matters complained of. This provision is not in issue here.

Humboldt Steamship Co. involved only the standards for a writ of mandamus, in a situation in which the ICC had denied jurisdiction of the complaint. *Kansas City Southern* again involved the scope of mandamus, where the ICC had refused to perform a ministerial act commanded by the statute. These cases also shed no light on the present situation, where the ICC has held a full hearing but has made its decision on one set of facts, making no findings on other evidence proffered by the complainant. If the decision of the ICC was correct on the evidence considered, the additional evidence could have no effect upon the outcome of the case, and the failure to consider it or make findings thereon does not amount to a denial of hearing.

Monongahela also cites *Eastern-Central Motor Carriers Assn. v. United States*, 321 U.S. 194 (1944), *ICC v. Clyde Steamship Co.*, 181 U.S. 29 (1901), and *East Tennessee, Virginia & Georgia Ry. v. ICC*, 181 U.S. 1 (1901), for the proposition that this court will remand for a hearing when the ICC fails to make an adequate inquiry on the facts. But these cases merely stand for the proposition that the Commission must articulate the basis for its decision, and that if it does not, the proper remedy is remand for necessary findings, not determination by the court of matters requiring an administrative discretion. They do not involve an alleged failure to conduct a hearing, and as shown above and as found by the Court of Appeals, the ICC here did conduct a full inquiry based on relevant evidence, and made adequate findings to support its conclusion.[12]

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[12] Even the dissenting judge in the Court of Appeals below did not question the adequacy or depth of the ICC's inquiry. He simply took a different view of the ICC's interpretation of the Order in No. 36574.

IV. Monongahela Has Shown No Special or Important Reason For Grant of the Writ

A. *No important question has been presented.*

It has been shown that the Order of the ICC in No. 36574 preserved to shippers and consignees the option to have their claims of unreasonableness of demurrage charges determined by the ICC pursuant to regular procedures, and that Monongahela voluntarily elected to avail itself of the special procedures. No constitutional or important federal question in conflict with decisions of other courts is alleged, and the decision of the Court of Appeals has not been shown to be in conflict with existing precedent.

The Order of the ICC in No. 36574 has limited application. First, it applies only to charges assessed by the petitioning railroads and other railroads which voluntarily adopt the procedures, and only to shippers or consignees who voluntarily file claims pursuant to the special procedures. Second, it applies only to charges accrued during the period December 28, 1976, to March 15, 1977. Although severe winter weather has been incurred in years subsequent to the winter of 1976-1977, no special procedures for relief from applicable charges having general application such as those approved in No. 36574 have been adopted.

B. *Remand for Reconsideration of the Issues Would Not Obtain a Different Result.*

The involved charges were calculated pursuant to an Average Demurrage Agreement.[13] In a subsequent case involving the same parties and the same location, but a subsequent year, it has been established that the calculation

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[13] See the decision of Division 2 below, Appendix D to the Petition for a Writ of Certiorari, at p. 26a.

of charges pursuant to an average agreement prevents a finding that applicable charges are unreasonable when delay to release of the cars is caused by weather conditions, including the condition of frozen lading. *Monongahela Power Co. v. Baltimore & Ohio RR.*, No. 80-1365, 4th Cir., February 13, 1981.[14]

CONCLUSION

For the reasons stated above, there is no error in the decision below, and the petition here sets forth no reason for review by this Court. The Petition for a Writ of Certiorari accordingly should be denied.

Respectfully submitted,

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March 10, 1981

[14] The decision of the Court of Appeals is reproduced in Appendix A.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-1365

MONONGAHELA POWER COMPANY,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
Respondents,

BALTIMORE AND OHIO RAILROAD COMPANY, /R
Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION.

Argued December 2, 1980 Decided February 13, 1981

Before BRYAN, Senior Circuit Judge, RUSSELL and MURNAGHAN, Circuit Judges.

John M. Cutler, Jr. (Charles J. McCarthy, Belnap, McCarthy, Spencer, Sweeney and Harkaway; Ruth E. Kipp, Legal Department, Monongahela Power Company on brief) for Petitioner; Lawrence H. Richmond, Interstate Commerce Commission (Richard A. Allen, General Counsel, Henri F. Rush, Associate General Counsel; Sanford M. Litvack, Assistant Attorney General; John J. Powers III, Andrea Limmer, Dept. of Justice on brief) for Respondents; John J. Paylor for Intervenor.

MURNAGHAN, Circuit Judge:

The winter of 1977-78 was bitter cold. Its after-effects still linger on. Monongahela Power Company seeks relief from an Interstate Commerce Commission order that denied Monongahel reparation of a part of $970,940 in demurrage charges paid to the Baltimore and Ohio Railroad. The share of the $970,940 for which reparation is sought represented not the actual costs of delay for the specific shipments in fact here involved, but rather that portion of the demurrage calculated to provide an inducement or incentive to prompt return which would contribute to an increased efficiency in operation of the rail system generally. The amounts designed to reimburse actual costs of delay are known as compensatory demurrage, and as to that portion of the $970,940, Monongahela does not seek reparation. The portion with which we must deal is known as a demurrage penalty.[1]

Freezing of coal in the freight cars and disruptions associated with a strike of the United Mineworkers Union at Monongahela's Harrison Power Station in Haygood, *[sic.]* West Virginia, were the reasons asserted by Monon-

[1] Actually, the demurrage charges do not fit precisely i ither classification. *See ICC v. Oregon Pacific Industries, Inc.*, 420 U.S. 184, 190 n.7 (1975): " '[D]emurrage charges are in part compensation and in part penalty; . . . in full character they are neither, not being rates as that term is used in connection with rate-making, nor penalties as that term is used in respect to penal impositions. They are sui generis.' " The Supreme Court added: "[D]emurrage charges have a dual purpose; and it is enough if one of them is a deterrent against undue detention of cars." *Id.* at 191.

We deal, therefore, with a situation where, although Monongahela may have done all within its power to avoid the delay, the cars were nonetheless removed from service. Hence, the delay is no less undue, viewed from the universal point of view of the railroads of the country as a whole, because Monongahela was not at fault. "The freight cars of the Nation thus became in essence a single common pool, used by all roads." *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 743 (1972).

gahela as the proximate causes for the delay in freeing and returning the rail cars.

In the absence of a special understanding between shipper and carrier, straight demurrage, fixing debits for any detentions beyond free time, applies. There is no bonus in the form of offsetting credits awarded when a car is released before expiration of free time. Frozen lading does generate a two day extension of free time for unloading.[2] In such a straight demurrage situation, the ICC has, with consistency, ordered reparation of the "penalty" portion of demurrage charges on proof that the shipper was not the proximate cause and had acted with due diligence. *E.g. Prince Mfg. Co. v. Norfolk & Western Ry.*, 356 I.C.C. 702 (1978).

To establish its freedom from fault, its due diligence, in an endeavor to establish its case for relief from demurrage penalties, Monongahela introduced evidence that it had installed heating and lump-breaking equipment to expedite unloading, and that it had hired additional personnel and incurred overtime for its regular employees to hasten the freeing and return of the freight cars. The Administrative Law Judge found that Monongahela had not proximately caused the car detentions, and that Monongahela had exercised due diligence. Neither of those findings has been disturbed in the course of the proceedings before the ICC.[3]

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[2] Monongahela received such two day extensions, and there is no dispute over entitlement to or receipt of that amelioration applicable to cases of frozen lading.

[3] The ALJ ascribed all the delay to frozen lading. ". . . the strike of the mine workers was a mere exacerbation of the problems created initially by the difficulty in unloading the frozen coal. It is found that frozen ladings were the causal force of the detention." I.C.C. Decision No. 37151, at p. 7.

The parties have expressed no dissatisfaction with that finding, and the case has proceeded solely on a frozen ladings basis.

However, over and beyond applicable tariffs, for many years there has been in force an "average agreement" between the parties[4] relating to the manner of computing demurrage charges on Monongahela shipments carried by the B&O. The principal purpose of that agreement was to spread demurrage liabilities over all shipments, rather than calculate them solely on an individualized per car basis. In particular, the average agreement provided for credits allowable to Monongahela, as shipper, for early returns of cars prior to expiration of free time. Such early returns could be balanced against late returns, and only to the extent, if any, of a net excess of delayed cars would demurrage be payable.

The ICC determined that its policy of excusing shippers from demurrage penalties where freedom from fault could be shown had not been, and should not be, applied where the parties, by terms of the average agreement, had otherwise provided for a credit system for minimizing demurrage by assigning values to the shipper's favor in case of early rlease of freight cars. *See Marshall-Putnam Oil Co. v. Chicago, R. I. & P. R. Co.*, 316 ICC 581, 583 (1962) (weather interference); *Interstate Power Co. v. Chicago, Milwaukee St. Paul and Pacific Rr.*, ICC Decision No. 36743 (Decided November 21, 1978) (weather interference); *Indiana University Trustees — Petition Seeking Remission of Demurrage Charges Caused by Severe Winter Weather*, ICC Decision No. 37001 (Decided March 14, 1979) (frozen lading); *International Minerals & Chemical Corp. v. Chicago and North Western Transportation Co.*, ICC Decision No. 37131 (Decided November 20, 1979) (frozen lading); *Cleveland Electric Illumi-*

[4] The uninterrupted duration of the average agreement, dating back to 1945, has exceeded 30 years. The average agreement was cancellable at any time by either party, effective on the first day of the month following notice.

nating Co. v. Consolidated Rail Corp., ICC Decision No. 37342 F (Decided August 22, 1980) (frozen lading); *Central Illinois Public Service Co. v. Illinois Central Gulf Rr.*, ICC Decision No. 37358 (Decided August 22, 1980) (frozen lading); *Carborundum Co. v. Louisville and Nashville Rr.*, ICC Decision No. 37330 F (Decided September 8, 1980) (severe weather conditions). The ICC has consistently determined not to allow a shipper the advantages of both straight demurrage and average agreement demurrage, while excusing it from the corresponding disadvantages of either.

Cases relied on by Monongahela either did not concern situations where average agreements had been entered, or, if an average agreement had been entered, were decided against the claimed reparation of demurrage. For that reason, they are not pertinent. *See Wheeling-Pittsburgh Steel Corp. v. Consolidated Rail Corp.*, ICC Decision No. 36943 (Decided February 23, 1979) (weather conditions and strike); *Federal Chemical Co. v. New York Central Rr.*, 308 ICC 386 (1959) (dealt with meaning of tariff which eliminated demurrage if weather interference made unloading impossible; held demurrage charge not to be abated); *Ford Motor Co. v. Chesapeake & O. Ry.*, 311 ICC 559 (1960) (no reparation granted); *Pennsylvania Rr. v. Kittaning Iron & Steel Mfg. Co.*, 253 U.S. 319 (1920) (the average agreement in that case, unlike the one involved here, provided that no demurrage should be collected when "shipments are frozen in transit so as to prevent unloading during the prescribed free time." The decision, moreover, rested on a conclusion that frozen lading was not sufficiently proven to justify the exemption).

The position adopted by the ICC is unassailable. Though Monongahela claims otherwise, this is not a case of tariff interpretation. To the contrary, the language of Freight Tariff 4-K naming General Car Demurrage Rules

and Charges is altogether unambiguous in imposing the demurrage (both compensatory and penalty). The question is simply whether the charge, clearly applicable, shall nevertheless, under the ICC's discretionary power to abate applicable tariffs and other charges, be forgiven to the extent of the penalty portion of the demurrage on the grounds that, in the circumstances, it is unreasonable. Hence cases such as *Coca-Cola Co. v. Atchison, T. & S. F. Ry.*, 608 F.2d 213, 218 (5th Cir. 1979) treating tariff interpretation as a matter of law, freely reviewable by the courts simply have no application. Instead we are in the area where "'. . . the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.'" *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974), *rehearing denied*, 420 U.S. 956 (1975).[5]

Monongahela makes the point that the brief average agreement between it and the B&O simply adopts the General Car Demurrage Rules and Charges, without spelling out any differences as to when and whether demurrage should be abated. It asserts that the same language should be accorded the same meaning and treatment whether it appears as part of a straight demurrage arrangement, or part of an average agreement. The point in no way advances Monongahela's cause. In either event, under straight demurrage or under average agreement, the applicable documents manifestly impose demurrage, penalty as well as compensatory. The difference comes only when the ICC has to decide whether, as a matter of discretion,

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[5] *Cf. United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 536 (1946): "Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene." *See also Consolo v. Federal Maritime Commission*, 383 U.S. 607, 621 (1966); *I.C.C. v. Jersey City*, 322 U.S. 503, 512-13 (1944).

to abate the penalty demurrage on a finding that the shipper was not the proximate cause and did exercise due diligence.

We have no occasion to investigate a possible clash between the extensive discretion conferred on the ICC and the spectre of arbitrariness which might arise if, in this case, we were dealing with a shipper operating on a straight demurrage basis. The prior general practice of reparation would, in that case, be a factor of weight on Monongahela's side. However, the B&O had functioned with Monongahela for over 30 years on an average agreement basis. Monongahela has been, consequently, in a position to earn credits for prompt release of cars, and thereby to reduce, overall, the demurrage which would have been payable on a straight demurrage basis.

Those grounds, especially since they have been consistently applied by the ICC in other cases, suffice to make the difference in treatment depending on a difference in contractual arrangements between carrier and shipper, reasonable.

We do not suggest, of course, that the mere existence of the average agreement foreclosed any other outcome. Presumably the power of the ICC to excuse payment of charges for justifiable reasons was still paramount. But the fact that the ICC *may* do something is no authority for the proposition that it *must* do it. The decision to deny reparation in the present case was neither arbitrary nor capricious nor unreasonable, nor an abuse of discretion. 5 U.S.C. § 706 (The Administrative Procedure Act).

AFFIRMED.